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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

No. 1228

LAWRENCE W. MEDLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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INDEX.

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	7
Conclusion	24
Appendix A (Opinion of the Court below)	1-A
Appendix B (Judgment of the Court below)	21-A
Appendix C (Order of the Court below on Petition to Rehear)	22-A

CITATIONS.

Cases:

Blocker v. United States, 288 F. 2d 852 (CA DC, 1961) 20, 22

Boatwright v. United States, 105 F. 2d 737 (CA 8, 1930) 20, 23

Delaney v. United States, 199 F. 2d 107 (CA 1, 1952) 7, 11

Ezzard v. United States, 7 F. 2d 808 (8th Cir. 1925) 24

Greenburg v. United States, 280 F. 2d 472 (CA 1, 1960) 15, 19

Irvin v. Dowd, 366 U. S. 717 (1961) 7

Perez v. United States, 297 F. 2d 12 (CA 5, 1961) .. 20, 23

Smith v. United States, 230 F. 2d 935 (CA 6, 1956) . 23, 24

United States v. Bell, 351 F. 2d 868 (6th Cir. 1965)..
United States v. Cumberland, 200 F. 2d 609 (CA 3, 1952) 20,
Washington v. United States, 327 F. 2d 793 (CA 5, 1964) .....

Statutes:

18 U. S. C. 1503 3
28 U. S. C. 1254 (1) .....

Constitution of the United States:

Fifth Amendment .....
Sixth Amendment .....

Miscellaneous:

Darrow, Clarence, "The Story of My Life" .....

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To the United States Court of Appeals for the Sixth Circuit.

Lawrence W. Medlin, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled matter on December 29, 1965.

OPINION BELOW.

The opinion of the court below (Appendix A, *infra*, pp. 1-A-20-A is reported at 353 F. 2d 789.

JURISDICTION.

The judgment of the court below (Appendix B) was entered on December 29, 1965. A timely petition for rehearing was denied on February 17, 1965 (Appendix C). The time for filing his petition has been duly extended by order of Mr. Justice Stewart to and including April 18, 1966. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

1. Whether Petitioner was denied the fair and impartial trial required by the Fifth and Sixth Amendments to the Constitution of the United States by reason of the District Judge's denial of Petitioner's timely requests for a continuance based upon continuous and intensive prejudicial publicity which the same judge, approximately ninety (90) days before the beginning of Petitioner's trial, had found sufficiently prejudicial to require the transfer of the trial of Petitioner and his co-defendants from the district in which Petitioner was ultimately tried, and ordered such transfer as to all defendants notwithstanding Petitioner's objection; and where this prejudicial publicity had been intensified and compounded by coverage by all news media of the trial and conviction of the said co-defendants in the adjoining district and their sentencing shortly before the commencement of Petitioner's trial at Nashville.

2. Was Petitioner deprived of a fair trial and of the effective assistance of counsel guaranteed by the Sixth Amendment by the action of the District Court in setting the case for trial upon exceedingly short notice; refusing to grant a continuance based upon the motions and affidavits of counsel filed on March 25, 1964 and March 30, 1964; and its refusal to grant relief when counsel made it known before and during the trial that he was physically

unable to continue; or upon the motion for a new trial, upon which the affidavit of counsel and undisputed medical proof were adduced to show his state of exhaustion and disability during the period of the trial?

3. Did the prosecutor's closing argument to the jury constitute prejudicial error which deprived Defendant of a fair trial; and particularly, did the prosecutor's expression of his personal belief in Petitioner's guilt constitute prejudicial error and deprive Petitioner of his right under the Sixth Amendment to be confronted by the witnesses against him?

4. Did the supplemental charge of the Court, given in response to a request from the jury that the Court review the instructions dealing with reasonable doubt, constitute prejudicial error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in part:

> * * * nor shall any person * * * be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment provides in part:

> In all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * * to be confronted with the witnesses against him * * * and to have the assistance of counsel for his defense.

Section 1503, Title 18, U. S. C., provides in its applicable part:

> Whoever corruptly * * * endeavors to influence, intimidate, or impede any * * * petit juror * * * in the discharge of his duty * * * shall be fined not more that $5,000 or imprisoned not more than five years or both.

STATEMENT.

Petitioner was sentenced to eighteen months confinement following his conviction by a jury upon a charge of violation of 18 U. S. C., § 1503; the court below affirmed.

On May 9, 1963, a five-count indictment was filed in the United States District Court for the Middle District of Tennessee in which the Petitioner, James R. Hoffa, and five other Defendants were charged with offenses involving alleged attempts to obstruct and impede the due administration of justice in the District Court of the United States. Petitioner was named only in the second count of the indictment which charged specifically that he, on or about October 23, 1962, met with James C. Tippens and informed Tippens that he would be paid ten thousand dollars if he would vote for the acquittal of James R. Hoffa in the trial then in progress, and that Medlin was aided and abetted in this alleged attempt to influence Tippens by the said James R. Hoffa (DA 4)[1]

Various preliminary proceedings were conducted in the case, and these together with collateral related incidents, including the disbarment and indictment of Mr. Hoffa's Nashville attorney, Z. T. Osborn, Jr., and the continuing intensive investigation by the Department of Justice generated enormous and continuous publicity on a nationwide scale, but of particular intensity in the Nashville area. Another collateral incident was the action of District Judge Frank Gray, Jr., of the Middle District of Tennessee, in recusing himself from the case, and the designation of Judge Frank Wilson of the Eastern District of Tennessee at Chattanooga to hear the case.

Upon application of Petitioner's co-defendants, by order of Judge Wilson entered at Nashville on December 28,

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[1] References to "DA" are to Petitioner's Appendix in the Court of Appeals.

1963 (DA 5), the trial as to all defendants was transferred to the Eastern District of Tennessee at Chattanooga. This order was based upon the specific finding by Judge Wilson that the publicity in the Middle District of Tennessee had been so intense and prejudicial to all defendants that the interests of justice required transfer. The transfer as to Petitioner was made notwithstanding his objection and he was obliged to seek a Writ of Mandamus against Judge Wilson in the Sixth Circuit Court of Appeals to secure his right to a trial in the Middle District of Tennessee. This Mandamus was granted (Lawrence W. Medlin v. Hon. Frank Wilson, U. S. Court of Appeals for the Sixth Circuit, No. 15,719) and accordingly the case as to Petitioner only was returned to the Middle District of Tennessee on January 22, 1964 (DA 12). The trial of the other defendants then proceeded at Chattanooga for more than six weeks and ended on March 4, 1964, in the conviction of Mr. Hoffa on two counts and three of the co-defendants on one count each. These defendants were sentenced at Chattanooga on March 12, 1964. All these proceedings were widely publicized in the Nashville area.

On March 16, 1964, an order was entered by Judge Wilson setting the Petitioner's case for trial for 9 o'clock A. M., March 30, 1964, on the Second Count of the indictment, the only count in which Petitioner was named (DA 13).

On March 25, 1964, the Petitioner filed a motion for a continuance with supporting exhibits (DA 14). This motion was overruled by an order entered March 27, 1964 (DA 22).

On March 30, 1964, Petitioner filed another motion for a continuance supported by additional exhibits and stipulation (DA 24). This motion was also overruled and the trial was begun on March 30, 1964 (DA 57).

Both these motions for continuance were based upon the inability of Petitioner's counsel to appear adequately prepared for the trial, on account of his excessive work-load during the preceding weeks; and upon the excessive publicity which had appeared in Nashville news media for many months preceding the trial, and especially since the Chattanooga trial had ended in the conviction of certain of the defendants above-named, including James R. Hoffa, on other counts of the indictment.

Petitioner's trial began at Nashville on March 30, 1964, and continued for five days. On the fifth day, after the close of the evidence but before the argument of counsel, during a conference in chambers, counsel for Petitioner informed the Court specifically of his state of extreme physical exhaustion and made clear his contention that the rights of the Petitioner would be seriously impaired if the trial proceeded at that time (DA 76, 77). Judge Wilson, however, ordered the trial to continue, and after the argument of counsel, and the charge of the Court, the jury retired at 2:23 o'clock P. M. on April 3, 1964, to consider its verdict (DA 82). At 5:10 o'clock P. M., the court received a written request from the jury to review the charge as it related to reasonable doubt. Whereupon the court recalled the jury and charged it further on this question (DA 82). The jury retired again at 5:13 o'clock and seven minutes later, at 5:20 o'clock, returned with its verdict of guilty.

Immediately thereafter, Petitioner's counsel returned to his office and almost instantly collapsed into a coma. He was found in this condition on the following morning by his secretary, who summoned a physician. This doctor immediately removed counsel to a hospital where he spent approximately five days recovering from the effects of his profound exhaustion. The affidavit of counsel and the testimony of this physician both offered in support of

Petitioner's motion for a new trial and both of which are without contradiction in the record are found beginning at pages 50a and 86a respectively of Petitioner's appendix in the Court of Appeals, which is filed herewith.

REASONS FOR GRANTING THE WRIT.

1. With respect to the first question presented above dealing with the effect of the prejudicial publicity in the area of the trial and the refusal of the District Court to grant Petitioner's request for a continuance based thereon, the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter; namely **Delaney v. United States**, 199 F. 2d 107, decided by the Court of Appeals for the First Circuit in 1952; and further has decided a federal question in a way in conflict with applicable decisions of this Court, particularly **Irvin v. Dowd**, 366 U. S. 717 (1961).

There is no question that the publicity relating to this and related cases which was disseminated in the Middle District of Tennessee during the months, weeks, and days immediately preceding Petitioner's trial was extremely intense. The extent of the coverage of the newspapers and television news broadcasts in the area is contained in stipulations found at DA 35 through DA 44. Collections of clippings reflecting the extent and nature of the newspaper publicity were filed as exhibits to Petitioner's motions for continuances in the District Court and are a part of the record in the Court of Appeals (see DA 16), although these exhibits have not yet been transmitted to this court.

The extent and nature of this publicity is not seriously in question. It was recognized by the District Judge in an opinion filed in this very case on December 28, 1963, wherein he found the publicity to be so intense and so prejudicial that he was constrained to transfer the trial from the district as to all defendants, including Petitioner,

who objected to the transfer and was compelled to obtain a Writ of Mandamus from the Court of Appeals in order to secure a trial in his own district. In this opinion (DA 5), the District Judge stated in part as follows:

> "A review of the nature and extent of the publicity within the territorial extent of the United States District Court for the Middle District of Tennessee discloses that during the period since the indictment of these defendants and particularly during the period since November 18, 1963, the date upon which an order was entered setting this case for trial upon January 6, 1964, the publicity has been quite prejudicial to **each of the defendants herein** with respect to the matters upon which he here stands for trial.
>
> * * * * * * * *
>
> Suffice it to say that publicity that would be logically considered **prejudicial to each of the defendants** has appeared almost daily within the District in recent weeks, receiving front page consideration upon most days and often appearing in the lead headlines of the day in the two daily metropolitan newspapers at Nashville, Tennessee.
>
> * * * * * * * *
>
> "* * * However, the record in this cause discloses a remarkable coverage of each county in the entire Middle District of Tennessee by the two Nashville newspapers that have so fully and prominently covered every aspect of this case as well as many related and unrelated matters directly and indirectly involving one or more of the defendants . . . It is apparent to the Court that a jury panel representative of a fair cross section of the District could not be drawn at this particular time without a large percentage of them having been recently exposed to intensive publicity reasonably expected to influence them in their attitudes toward these defendants with regard to the

particular charges on which the defendants here stand for trial.

* * * * * * * *

". . . Even though a nominally impartial panel should be selected, in view of the nature and extent of the publicity here involved, the case might proceed under the cloud of possible error. In safeguarding the right to a fair trial the appellate courts have reversed the trial courts for a denial of a change of venue, or in the alternate a postponement, where publicity has been of a somewhat similar nature and extent to that here encountered. See **Irvin v. Dowd,** 366 U. S. 717; **Delaney v. U. S.,** 199 F. 2d 107; **Briggs v. U. S.,** 221 F. 2d 636."

This was the solemn finding of the District Judge on December 28, 1963.

The intensity of the publicity was recognized by the government in the argument to the jury in the present case by special government counsel, Mr. Hooker, as follows (DA 79):

"Why, ladies and gentlemen of the jury, Mr. Medlin had the temerity to tell you that he never heard of Hoffa when every man and woman in the sound of my voice knows that from way back in the Summer of 1962 continuously on and on **really down to the present,** the papers have been simply afire with his name and you couldn't turn on the radio or television without hearing something about Hoffa or his Teamsters Union."

The Court of Appeals, in its opinion, obliquely recognized the intensity of the publicity as follows (App. p. 5-A):

"It must be recognized that the several indictments and trials of Mr. Hoffa and his associates over the past several years have continuously been given prominence in all news media. Such prominence continues."

Neither the government nor the inferior courts has suggested any reason why the climate created by the publicity as of December 28, 1963, which was then held by the District Court to be so prejudicial as to require a transfer from the district should be deemed to have been ameliorated by March 30, 1964, despite the increased and more damaging publicity resulting from the conviction and sentencing of Hoffa and the others in Chattanooga to the extent that Petitioner should not have been granted a continuance as requested. In the order of March 27, 1964, denying Petitioner's motion for a continuance, the District Court said (DA 22):

> * * * "With regard to the first ground of the motion, the Court has carefully read and considered the motion and all exhibits filed therewith, including all newspaper accounts and other publicity made a part of the exhibits. Much of this publicity has no reference whatsoever to the defendant, Medlin. Only a very small part of it makes any specific reference to him or to matters that might properly be considered relevant to his case."

It thus appears that it was the notion of the District Judge that the publicity attending the Hoffa case was somehow unrelated and would not be associated in the minds of the veniremen with the prosecution of Petitioner.

The fallacy of this concept was noted by the Court of Appeals for the Sixth Circuit in its opinion in the case of **United States v. Bell,** 351 F. 2d 868 (6th Cir. 1965) a related prosecution also arising out of alleged attempts to influence the jury in Mr. Hoffa's 1962 trial, at page 877:

> "It was for the benefit of Mr. Hoffa that he is charged with endeavoring to influence jurors. Under these circumstances, it is not apparent how he could be disassociated with Mr. Hoffa. At the minute he went on trial, the issue would be whether he was involved in the Hoffa trial of 1962. The defendant's

case could not be tried in a vacuum. How long should the trial court have continued the case? One month? Three months? Six months? A year?"

The situation with regard to publicity is virtually identical with that encountered in **Delaney v. United States,** *supra.* Particularly pertinent is the language of the First Circuit in the **Delaney** opinion at 199 F. 2d page 115 as follows:

> "When counsel for the government suggested that the government might not object to a reasonable continuance, say until February, 1952, the district judge remarked: 'My own impression, which may be entirely erroneous, is that so long as the political election has to be conducted, no one can say that any particular month between now and then is any better that any other month.' **But under the circumstances, if assurance of a fair trial would necessitate that the trial of the case be postponed until after the election, then we think the law required no less than that.**" (Emphasis supplied.)

2. With respect to the second question presented above, concerning effective assistance of counsel under the circumstances of this case, the Court of Appeals has decided an important question of federal law which has not been, but should be settled by this Court, and has so far sanctioned the departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In its opinion the Court of Appeals says, concerning this contention of Petitioner:

> "This presents a subject upon which we have no precedential guides. We at once recognize that persons charged with crime have the constitutionally guaranteed right to effective assistance of counsel upon trial" (App. p. 15-A).

With respect to the condition of counsel during the trial, the record discloses the following:

The motion for continuance filed on March 25, 1964 (DA 14) contains allegations supported by the affidavit of counsel concerning his extremely heavy trial calendar for the period beginning March 30, 1964, and extending through the month of April. Counsel was, of course, required during the weeks preceding the beginning of the instant trial to give attention to preparation for those cases set upon this calendar.

Petitioner's motion for continuance filed on March 30, 1964 (DA 24) in which it was specifically set out that counsel had been unable to properly prepare Petitioner's defense on account of commitments incurred prior to the setting of the trial, which motion was also supported by an affidavit setting out in great detail the activities and demands upon counsel during the period immediately preceding the trial date.

The statements made by counsel in support of the motion for continuance in open court on the morning of March 30, 1964, to the effect that he had been working "twelve, fifteen, eighteen hours a day and sometimes twenty-four and even forty-eight hours at a stretch * * * to the best of my ability, Your Honor, I say that I am not ready to adequately represent this man * * *" This motion was summarily overruled by the Court (DA 59a1).

On the afternoon of April 3, 1964, the fifth and final day of the trial, during proceedings in chambers, counsel for Petitioner frankly and plainly stated to the Court that he was and has been in a state of physical exhaustion to the extent that he had not been and was not able properly to conduct the Petitioner's defense and requested a mistrial (DA 76). This request was also summarily dismissed by the Court. This took place after the close of the proof and immediately before the argument of counsel.

Within three hours thereafter, the trial had been concluded by the argument of counsel, the charge of the Court, the deliberation of the jury, the supplemental charge of the Court on reasonable doubt, and the return of the verdict. Within one hour thereafter, Petitioner's counsel had returned to his office and lapsed into the comatose condition for which he required hospitalization.

Government counsel and the Court of Appeals make much of the fact that Petitioner's counsel failed to object to the portions of the government counsel's argument and the supplementary charge of the Court herein complained of. When these matters are discussed, the point is made that Petitioner's counsel failed to object at the time. When Petitioner's contention that his counsel was ineffective because of exhaustion is discussed, it is stated that there is nothing in the record to indicate that counsel was in any way ineffective.

It is further significant to note that one of the grounds for Petitioner's original motion for continuance was that counsel was committed to appear in the Circuit Court of Sevier County, Tennessee, on March 30, 1964, in a very important civil case which had been pending for more than two years and which had been specially set some considerable time before the present case was set for the same date (DA 14-21). The circuit courts of the State of Tennessee are generally considered to be courts of equal dignity with the United States District Courts, and the prevailing rule of practice in middle Tennessee is that in case of a conflict such as this, the case which has first been set will be tried and the case subsequently set will yield. Judge Wilson, however, handled this conflict by telephoning to the circuit judge, without prior notice to Counsel, and arranging for a continuance of the civil case in order to "recognize and preserve the comity between the courts" (DA 23). It is difficult to understand how this procedure could contribute to comity between the courts. At any

rate, notice of this action was only received by Petitioner's counsel on March 28, 1964, two days before the scheduled beginning of the trial. Its effect was to put Petitioner to trial **with actually only two days notice.** (See Petitioner's Petition to Rehear in the Circuit Court of Appeals, filed herewith, pages 6-9.)

Immediately upon the conclusion of the trial Petitioner's counsel collapsed into a comatose condition for which he was hospitalized. His physician attributed this to overwork and a state of complete physical exhaustion for several weeks prior to his admission to the hospital. Relative to this period, the physician testified upon the motion for a new trial as follows (DA 89):

> "During this period of time he has lost weight, **his thinking has been more or less automatic** due to the fact that he was so sleepy he could hardly stand on his feet. He stated that the only medicine he has taken was Desbutal, which is a stimulant, and which he had to take to keep from falling asleep.
>
> • • • • • • • •
>
> In such a situation, a person cannot think properly due to physical exhaustion, and he should never have waited until he collapsed physically to consult a physician, at which time he was unable to do so himself."

Additional details concerning the effect of the exhausted condition upon counsel are seen in his affidavit in support of Petitioner's motion for a new trial (DA 50). **Both the affidavit and the testimony of the physician are uncontradicted in the record.**

In determining whether or not this situation constituted an impairment of the effectiveness of counsel, it may be appropriate to consider the words of Clarence Darrow from his autobiography:

> "The trying of cases in courts calls for an acute intelligence, the capacity for instantaneous thought

and for deciding what to do in the twinkling of an eye. Delay often means defeat; one must strike while the iron is hot. The situation demands perfect self-possession; no matter how apprehensive one may be internally, he must remain as calm and unruffled externally as a placid pool" (Darrow, Clarence, "The Story of My Life", Chapter 45).

3. With respect to the third question presented above dealing with the prosecutor's closing argument to the jury, the Court of Appeals has rendered a decision which is clearly in conflict with the decision of another Court of Appeals on the same matter, namely, **Greenburg v. United States**, 280 F. 2d 472, decided by the Court of Appeals for the First Circuit in 1960; and other decisions of other courts of appeals as cited below.

The most flagrant portions of the prosecutor's argument which Petitioner contends were prejudicial and improper and those which embody the prosecutor's expression of his own personal belief in Petitioner's guilt are as follows:

"Mr. Hooker: . . . It is a bad thing for a man of good character to get in trouble. **Benedict Arnold, when he betrayed his country had as fine a character as any man in the nation. Judas Iscariot, the disciple, when he betrayed his Lord had as fine a character as anyone perhaps in the land.**

But unfortunate as it is, men who can show good character which stands as a witness for him, frequently commit offenses against the law. And it is your responsibility to determine whether or not this defendant did commit such an offense.

Why, ladies and gentlemen of the jury, this is not a war as my friend Mr. Parker with considerable eloquence said between Kennedy and Hoffa. **This is a war against tampering with justice started by Judge William E. Miller.** This is a case that arose out of

the trial of another case just down the hall here where they tried to fix the jury.

This is not something that originated in Washington and that is the reason I stand here as a Nashville lawyer because **I resent it.** Courts have been my life. The sanctity of the courts, the protection of the courts, has been my ambition and **when people come into this hallowed place, whether it be James R. Hoffa or not, and try to fix a jury and so corrupt justice, I take my stand on the side of the law.**

I tell you, ladies and gentlemen of the jury, if jury fixing is to be tolerated in this country you might as well tear down this beautiful flag now with its 50 stars and stomp it into the ground and then go home and burn your houses up.

It is no laughing matter. It is a most serious responsibility that you as good citizens have ever been confronted with in your life. **You are called on now to say which side do you stand on** (DA 77-78).

* * * * * * * *

Now, he says that Tippens was trying to justify himself, why? You saw this man and observed him, what sort of citizen did he look like to you? Why should he come down here in this courthouse and go down to the other courtroom, other chambers, and tell Judge Miller that this is what happened? And get excused off of the Hoffa jury? I can imagine somebody wanting to get off the jury but what all I believe going on here about trying to fix it, trying to fix it (DA 79).

* * * * * * * *

I'm a lawyer, Special Prosecutor for the Department of Justice to present the facts to you and I've got a responsibility just like you, I would be violating my responsibility, violating my oath as a lawyer if I stood here this morning and exhorted you to con-

vict a man that you thought was innocent. But I have the courage and I believe you have on these facts regardless of what sympathy you might have, it is a bad thing, but when the laws of the United States have been flaunted and violated and trampled underfoot, we accepted you as jurors because we thought you had the kind of honor, the kind of character that would meet the test (DA 80, 81).

Mr. Neal pointed out to you it don't make any difference whether it is successful or not, you don't have to catch a man with the money in his hand or the wool in his teeth as we used to say about a sheep-killer, if he reaches, if you reach your hand toward you in the sacred position in which you occupy, oh, they tell me there is another derivation of the twelve, but I believe the twelve that sit on a trial of men, patterned after the twelve disciples that followed Jesus of Nazareth, you have that sort of duty today, ladies and gentlemen of the jury (DA 81, 82).

* * * * * * * *

So, you stand today as a symbol of the jury system. You stand here as stalwart custodians of this flag. You are now the most important people in this courtroom. In your hands rests the proposition, was jury tampering, jury tampering, jury fixing to be tolerated in the Middle District of Tennessee?" (DA 82).

The entire tenor of the argument embodies not only the personal belief of the prosecutor in the guilt of the Petitioner, but also the proposition that the issue before the jury is "Was jury tampering, jury tampering, jury fixing to be tolerated in the Middle District of Tennessee?" rather than the question of whether or not the Petitioner was guilty of the offense as charged in the indictment. The jury was exhorted to take its stand with Mr. Hooker on the side of the law. "You are called on now to say which side you stand on."

Compare the words:

> "I tell you, ladies and gentlemen of the jury, if jury fixing is to be tolerated in this country you might as well tear down this beautiful flag now with its 50 stars and stomp it into the ground and then go home and burn your houses up."

with the following language which caused a reversal in the case of **Washington v. United States**, 327 F. 2d 793 (C. A. 5, 1964):

> "One-half of a million people in this district have a right to be secure in their homes, secure against violators of the law."

It is difficult to imagine an argument more inflammatory or prejudicial than this prosecutor's likening of the Petitioner to Benedict Arnold and Judas Iscariot as quoted above.

With respect to the expression of the prosecutor's belief in Petitioner's guilt, it is submitted that the words:

> "I resent it . . . when people come into this hallowed place, whether it be James R. Hoffa or not, and try to fix a jury and so corrupt justice, I take my stand on the side of the law.
>
> ". . . I can imagine somebody wanting to get off the jury but what all I believe going on here about trying to fix it, trying to fix it.
>
> . . . I would be violating my responsibility, violating my oath as a lawyer if I stood here this morning and exhorted you to convict a man I believe was innocent. And I wouldn't do that any more than I know that you wouldn't vote to convict a man you thought was innocent. But I have the courage and I believe you have on these facts regardless of what sympathy you might have, it is a bad thing, but when the laws of the United States have been flaunted and violated and trampled under-foot . . ."

constitute sufficiently plain expressions of this prosecutor's personal belief in the Defendant's guilt. The Court of Appeals, while apparently not considering all these portions of the argument, did say (App. 12-A):

> "While not entirely clear, we assume that such remarks of government counsel could be construed as an expression of his belief that Defendant was guilty.
>
> Expression of a prosecutor's personal belief of guilt of a Defendant has been condemned by state court decisions, and the First Circuit did so in **Greenburg v. United States**, 280 F. (2) 472, 474-475 (C. A. 1, 1960). Such, however, has not been the rule in the United States Courts generally, nor in this circuit. . . ."

The Court goes on to say that:

> "Government counsel emphasized that his argument was based 'on these facts' to-wit, the facts in proof."

Petitioner submits that the prosecutor, far from emphasizing that his belief was based "on these facts" indicated throughout his argument, specimens of which are set out above, that his belief was based on a superior knowledge and that the words "on these facts" in context grammatically refer to the hoped for belief of the jury and not in any wise to that of the prosecutor. The following language from the opinion of the First Circuit Court of Appeals in the **Greenburg** case (at 280 F. 2d 475) is singularly appropriate:

> ". . . To permit counsel to express his personal belief in the testimony (even if not phrased so as to suggest knowledge of additional evidence not known to the jury), would afford him a privilege not even accorded to witnesses under oath and subject to cross-examination. Worse, it creates the false issue of the reliability and credibility of counsel. This is peculiarly unfortunate if one of them has the advantage

of official backing. The resolution of questions of credibility of testimony is for impartial jurors and judges. The fact that government counsel is, as he says, an advocate is the very reason why he should not impinge upon this quasi-judicial function. We believe the canon to be elemental and fundamental (Citations).'

It is true that special circumstances, such as a personal attack upon counsel may occasionally justify a reply (Citing cases). Too much has sometimes been read into these cases due in part, perhaps, to language in some of the opinions. To the extent that cases may be found that permit counsel to state their personal belief as a matter of course, we do not follow them. We agree with the statement that 'No one who is at all conversant with jury trials can fail to see the possible prejudice . . .' (Citation)."

This conflict alone, it is suggested, would make it appropriate for this Court to grant the Writ of Certiorari in order to make a rule concerning this important and troublesome question.

4. With respect to the fourth question presented above concerning the supplemental charge of the Court upon the subject of reasonable doubt, the Court of Appeals has rendered a decision in conflict with the decisions of the Court of Appeals for the District of Columbia in **Blocker v. United States,** 288 F. 2d 852 (1961); **United States v. Cumberland,** 200 F. 2d 609 (CA 3, 1952); **Boatwright v. United States,** 105 F. 2d 737 (CA 8, 1930); and **Perez v. United States,** 297 F. 2d 12 (CA 5, 1961).

At the conclusion of the argument, the Court gave a satisfactory charge to the jury which then retired to consider of its verdict. After a little more than two and three-quarters hours of deliberation, the jury sent to the District Judge a written request as follows:

"Will you please review instructions with regard to reasonable doubt to the jury?"

Thereupon the Judge recalled the jury to the courtroom and delivered himself of the following instruction:

The Court: Ladies and Gentlemen, the jury has returned in the case. The court understands that the jury desires some additional instruction with regard to the court's former instructions upon reasonable doubt.

And I would instruct you further, Ladies and Gentlemen, that a reasonable doubt is a fair doubt based upon reason and common sense and **arising out of the state of the evidence.** It is not a fanciful or an imaginary doubt or a doubt unrelated to the state of the evidence.

A reasonable doubt would exist in the case when, after fair and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt as charged. To be satisfied beyond a reasonable doubt of the defendant's guilt does not mean that the government has to make out the case to an absolute certainty. It has to prove it only so as to leave no reasonable doubt of the defendant's guilt in the minds of the jury. It is not required that the government should exclude all doubt, but only to exclude reasonable doubt. **If there should be evidence in the case that has created a reasonable doubt in your minds as to the guilt of the defendant, then the case is not made out beyond a reasonable doubt. But if there is no reasonable ground for doubting the defendant's guilt, then the case was made out beyond a reasonable doubt.**

Now, are there any other matters, further instructions desired at this time? If not, Ladies and Gentlemen, will you continue your deliberations. Continue them in the same spirit that the court instructed you previously, realizing the fact that this has been

a rather lengthy case, and that you should exercise every reasonable effort to reconcile any differences of opinion and to arrive at a unanimous verdict in the case and report back to the court your verdict when you have reached one.

All right, will you consider further your verdict? (DA 83).

The jury then retired and within seven minutes thereafter returned with its verdict of guilty.

Petitioner contends that the emphasized words in the above quoted supplemental charge were erroneous in that they suggest the necessity of Defendant's introducing evidence to **create** a reasonable doubt and do not inform the jury that a reasonable doubt may arise from a **lack of evidence**, thereby placing the burden of proof upon the Defendant.

The prejudicial effect of this erroneous charge is particularly evident since the emphasized words, the pernicious words, were **the last spoken by the Court to the jury** and the verdict was returned **within seven minutes thereafter.** It was apparent that the jury was confused or unsure on the subject of reasonable doubt, from the fact that it requested further instructions. Under these circumstances it was clearly the duty of the District Judge to give particularly clear and explicit epexegesis, and the delivery of this instruction which Petitioner contends was erroneous was, therefore, particularly damaging. Its prejudicial effect was dramatically demonstrated when the jury returned within a very few minutes thereafter with its verdict.

In approving this language the decision of the Court of Appeals was squarely in conflict with that of the Court of Appeals for the District of Columbia in the case of **Blocker v. United States,** *supra,* wherein analogous language was held erroneous as improperly placing the burden of proof upon the Defendant and the conviction was

reversed even though the matter was covered correctly in portions of the charge both preceding and following the erroneous instruction.

In **United States v. Cumberland,** 200 F. 2d 609 (CA 3, 1952) the Court reversed a conviction holding that an instruction dealing with the burden of proof and reasonable doubt was erroneous and required a reversal even though correct instructions had been given previously in the charge and the Defendant failed to object to the erroneous instructions when given.

Boatwright v. United States, 105 F. 2d 737 (CA 8, 1930) is almost exactly parallel to the instant case. There the District Court's judgment of conviction was reversed and the appellate court held that the charge on reasonable doubt was erroneous because it was confusing and further held that it was error to charge the jury as follows at page 740:

> "On the other hand, if you should find and believe from the evidence in this case that these defendants did not devise an artifice or scheme to defraud . . . then it would be your duty to find either one or both of them not guilty."

In holding this portion of the charge, which is analogous to the charge complained of in the case at bar, erroneous, the court said, at 105 F. 2d page 740:

> "But this instruction placed upon the defendants the burden of convincing the jury that they did not devise a scheme, that they did not make false representations, that they did not intend to defraud . . . The instruction, we think, was erroneous."

In **Perez v. United States,** *supra,* the Court said, at 297 F. 2d, page 16:

> It is also fundamental to our jurisprudence that instructions to the jury must be consistent with each other, and not misleading to the jurors. **Smith v.**

United States, 230 F. 2d 935 (6th Cir. 1956). The fact that one instruction is correct does not cure the error in giving another that is inconsistent with it. **Smith v. United States**, *supra*. Most important, in no condition of proof is it permissible to leave with the jury the idea that it had become the duty of the defendant to establish his innocence to obtain an acquittal. See e. g., **Ezzard v. United States**, 7 F. 2d 808 (8th Cir. 1925).

In the **Smith** case, cited in **Perez**, the Sixth Circuit pointed out at 230 F. 2d, at page 939:

> . . . The fact that one instruction is correct does not cure the error in giving another instruction inconsistent with it.

And further,

> . . . The appellate court may take notice on its own motion of prejudicial error inherent in these charges.

CONCLUSION.

For all of the reasons advanced, it is respectfully submitted that the Petition for the Writ of Certiorari should be granted and the judgment of the Court below reversed.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

Opinion of the Court Below.

(Filed Dec. 29, 1965, Carl W. Reuss, Clerk.)

No. 16034.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,
v.
Lawrence W. Medlin,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Tennessee.

Decided December 29, 1965.

Before Cecil, O'Sullivan and Phillips, Circuit Judges.

O'Sullivan, Circuit Judge. Defendant-appellant, Lawrence W. Medlin, was convicted on the second count of a five count indictment in which he, together with James Hoffa and five others, was charged with attempting to obstruct the due administration of justice in a United States District Court in violation of 18 U. S. C. A., Sections 2 and 1503. Specifically, Medlin was charged with attempting to influence one James C. Tippens, selected for service as a juror in such United States District Court, by informing the said Tippens that he would be paid $10,000 if he would vote for the acquittal of James R. Hoffa in

a trial then pending in such District Court.[1] The involved indictment, returned in the Middle District of Tennessee, would normally have been set for trial in that district. However, upon motion of Hoffa and others the trial was transferred from Nashville to Chattanooga in the Eastern District of Tennessee. The motion to transfer had been made on the ground that prejudicial publicity had made it impossible for Hoffa and his codefendants to receive a fair trial at Nashville. Thereafter, on January 20, 1964, under direction of an order of this Court (CA 6, 1964, No. 15,719) the District Judge granted Medlin's motion for a separate trial and vacated, as to Medlin alone, the order transferring the trial to Chattanooga. Shortly thereafter the trial of Hoffa and his other codefendants began at Chattanooga. Hoffa was found guilty on two counts and the other codefendants guilty on one count each. James Hoffa had been charged as an aider and abettor of Lawrence W. Medlin in count two of the indictment, but a judgment of acquittal was directed because, the testimony of the accusing witness Tippens having been excluded, there was insufficient evidence. The trial at Chattanooga was concluded on March 4, 1964, and Hoffa and others were there sentenced on March 12, 1964. The trial, conviction and sentencing of Hoffa and his codefendants was the subject of much interest and coverage in all of the news media. The trial of appellant Medlin was commenced at Nashville on March 30, 1964, and terminated April 3, 1964.

The errors claimed by appellant are broadly: (1) that he should have been given a continuance because of publicity arising from the Hoffa trial; (2) that his counsel was denied adequate time to prepare for trial; (3) that

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[1] The attempted jury tampering charged in the involved indictment was alleged to have occurred in connection with the trial at Nashville, Tennessee, of the case of **United States v. James R. Hoffa and Commercial Carriers, Inc.** Such trial ended December 23, 1962, in a jury disagreement.

his counsel should have been permitted to inform the jurors that Hoffa had been acquitted of aiding and abetting Medlin; (4) that the evidence was insufficient to go to the jury; (5) that a new trial should have been granted because

(a) of improper argument to the jury by government counsel,

(b) instructions on the subject of reasonable doubt were improper, and

(c) he had been denied the effective assistance of counsel because of the physical and mental exhaustion of his attorney during the trial; and

(6) that the grand jury which indicted Medlin was illegally composed.

On March 14, 1964, two days after the sentencing of Hoffa and others, Medlin's case was set to be tried at Nashville on March 30, 1964. On March 25, appellant's counsel filed a motion for continuance. It was bottomed upon the claim that the publicity which had attended the trial, conviction and sentencing of Hoffa and others, and the publicity given to the setting of Medlin's trial foreclosed a fair trial of Medlin's case upon the date set. The motion also asserted that court engagements of appellant's counsel, made prior to the setting of the Medlin trial date, would prevent Medlin from having the effective assistance of his chosen counsel because of the shortness of time to prepare. This motion was denied on March 27. A second motion for continuance was filed on March 30, 1964, reasserting the grounds of the first motion, and adding the averment that in the short time permitted him by the District Judge's setting of a trial date, Medlin's counsel, R. B. Parker, Jr., of the Nashville Bar, had been unable to make sufficient preparation to afford Medlin the adequate assistance of counsel guaranteed by the United States Constitution.

1) Denial of continuance because of prejudicial publicity.

Appellant's motion for continuance was supported by newspaper clippings from Nashville and elsewhere concerning the Hoffa trial and the setting of the Medlin trial at Nashville. There was a stipulation that various radio and television stations had carried the same news stories. The District Judge denied this motion holding that whether pretrial publicity would prevent a fair trial could be better determined after the voir dire examination of the jurors. Upon such examination, inquiry was made of the jurors' acquaintance with the publicity and whether any opinions had been formed as to the guilt of Medlin. Each juror questioned on the subject said he was without any such opinion and while various jurors disclosed some familiarity with the Hoffa trial at Chattanooga, there was little indication of the jurors' previous knowledge of any connection between Medlin and Hoffa. No juror was challenged for cause. The District Judge was of the view that the involved publicity had not given much attention to the Medlin case, and concluded that the motion was not well taken. It was proper for the District Judge to defer consideration of the effect of publicity until relevant inquiry could be made upon the voir dire examination of the jury. **Hoffa v. Gray**, 323 F. (2) 178, 180 (C. A. 6, 1963), **cert. denied**, 375 U. S. 907, 84 S. Ct. 693, 5 L. Ed. (2) 692 (1961); **United States v. Kline**, 205 F. Supp. 637, 638 (D. Minn. 1962); **Wolfe v. Nash**, 313 F. (2) 393 (C. A. 8, 1963), **cert. denied**, 374 U. S. 817, 83 S. Ct. 713, 10 L. Ed. (2) 1041 (1963); **Mayo v. Blackburn**, 250 F. (2) 645 (C. A. 5, 1957), **cert. denied**, 356 U. S. 938, 78 S. Ct. 780, 2 L. Ed. (2) 813 (1958); **United States v. Bando**, 244 F. (2) 833, 838 (C. A. 2, 1957), **cert. denied**, 355 U. S. 844, 78 S. Ct. 67, 2 L. Ed. (2) 53 (1957). It is likewise the law that disposition of a motion for continuance based upon claimed prejudicial publicity is within the discretion of the District Judge who must evaluate the extent and character

of the publicity relied upon. **Estes v. United States**, 335 F. (2) 609, 614 (C. A. 5, 1964), **cert. denied**, 379 U. S. 964, 85 S. Ct. 656, 13 L. Ed. (2) 559 (1965); **United States v. Lombardozzi**, 335 F. (2) 414, 416-417 (C. A. 2, 1964), **cert. denied**, 379 U. S. 914, 85 S. Ct. 261, 13 L. Ed. (2) 185 (1964); **Hoffa v. Gray**, 323 F. (2) 178 (C. A. 6, 1963), **cert. denied**, 375 U. S. 907, 84 S. Ct. 199, 11 L. Ed. (2) 147 (1963); **United States v. Decker**, 304 F. (2) 702, 704 (C. A. 6, 1962); **Bearden v. United States**, 304 F. (2) 532 (C. A. 5, 1962), vacated on other grounds, 372 U. S. 252, 83 S. Ct. 875, 9 L. Ed. (2) 732 (1963), on remand 320 F. (2) 99, 101-103 (C. A. 5, 1963), **cert. denied**, 376 U. S. 922, 84 S. Ct. 679, 11 L. Ed. (2) 616 (1964). It should be noted, relevant to the effect of any pretrial publicity, that upon the opening day of the Medlin trial at Nashville there were but three or four spectators in the courtroom.

It must be recognized that the several indictments and trials of Mr. Hoffa and his associates over the past several years have continuously been given prominence in all news media. Such prominence continues. We are not persuaded, however, that the courts of this country are not impotent to provide a fair trial to Mr. Hoffa and those associated with him. This court has reviewed the publicity that preceded and surrounded Mr. Hoffa's trial at Chattanooga, and found that it did not foreclose the impaneling of a proper jury, nor the conduct of a fair trial. **United States v. Hoffa et al.**, 349 F. (2) 20 (C. A. 6, 1965). Our decision in **United States v. Bell**, ... F. (2) ... (C. A. 6, 1965), involved the trial of another person indicted for attempting to bring about the bribery of jurors in the 1962 trial of James R. Hoffa. We there dealt with facts and contentions so similar to the case at bar that **Bell** provides precedent for our decision here. We find no abuse of discretion in the denial of continuance on the grounds just considered.

2) Inadequate time to prepare.

The second motion for continuance was filed on March 30, the date set for commencement of the trial, and in such motion counsel averred that he had not had time in which to adequately prepare. He detailed the long hours that he had been required to spend in preparing his prior motion for continuance and in giving some attention to other obligations of his practice.[2]

The second motion was denied. We find no reversible error in such denial. Counsel who made the motion had been engaged by Mr. Medlin close to a year prior to the trial date and in that period of time had employed numerous pretrial procedures to prepare for presentation of Medlin's defense. Neither in the March 30 motion nor in appellant's address to this court is there set forth anything that counsel might have done by way of legal research, factual investigation, or other preparation that would have enhanced his presentation of appellant's defense. While the time between the setting of the trial and the trial date was relatively short, it was within the discretion of the trial judge to require that the trial proceed. **United States v. Decker,** *supra*; contrast **Townsend, et al. v. Bomar,** .... F. (2) ... (C. A. 6, 1965). No resulting prejudice to appellant has been shown and we find no abuse of discretion in what was done.

3) Denial of permission to inform the jurors of James Hoffa's acquittal.

At the beginning of the voir dire examination, counsel were asked how they proposed to handle the reading of count two of the indictment. This was the count upon

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[2] Mr. Parker's letterhead indicated he had some eight associates or partners. No reason is given why he did not have their assistance in preparing for trial, and at the trial if necessary.

which Medlin was to stand trial and in such count James Hoffa was charged with aiding and abetting Medlin. Hoffa had already been acquitted of such charge. Government counsel suggested that the charge against Hoffa be deleted in the reading of the indictment and that no reference thereto be made in examining the jurors. Appellant's counsel would not go along with such suggestion and urged that count two of the indictment be read in full and the jury informed of Hoffa's acquittal of such charge. The indictment was read in full and the jury thus informed that Mr. Hoffa had been indicted with Medlin in count two. While the District Judge formally sustained the government's objection to defense counsel informing the jury of Hoffa's acquittal, the questions put by Medlin's attorney appear to have placed this information before some, if not all, of the jurors. In all events the jurors examined on the point stated that they would not be affected by Medlin's charged involvement with Mr. Hoffa. The jury was instructed that the count two charge against Mr. Hoffa, and its disposition, should not be considered in determining the guilt or innocence of appellant. Defense counsel's closing argument to the jury contained extensive reference to the joint indictment of Medlin and Hoffa and repeated admonitions to the jury to give no attention to such fact. We find no error in what occurred in this regard.

4) Sufficiency of evidence.

James C. Tippens was in the insurance business in Nashville, Tennessee. Defendant Medlin was the proprietor of a sandwich shop in the same city. These men had been friends for some years prior to 1962. Often Tippens would stop at Medlin's sandwich shop before returning home after work. The claimed offense occurred during the picking of a jury for the trial of the case of **United States v. James R. Hoffa and Commercial Carriers, Inc.** This began on October 22, 1962, with United States District Judge

William E. Miller presiding. Tippens was a member of the jury panel called for such trial.

The Government's case contained the following proofs. Defendant Medlin knew that Tippens had been called for jury service. Tippens stated that in the evening of October 23, 1962, the same day he was tentatively accepted as a juror on the Hoffa case, he went to Medlin's place of business in response to a message that Medlin wished to see him. He testified that after waiting for Medlin to conclude some work, Medlin asked him to come outside and talk. They went to Tippen's car which was parked at the rear of Medlin's sandwich shop. The following is a quotation from Tippens' account of the conversation that ensued:

> "He said, 'We've got a chance to make some big money.' And I became suspicious and I said, 'Now, if it has anything to do with the Hoffa case, Red, I'm not supposed to talk about it.' And he said, 'Well, there is a lot of money involved. There is $10,000.00. And nobody will know where it came from.' And I said, 'Well, I'm not interested at all.' And I said, 'I'm not at all interested in it and I'm not supposed to talk about it.' He said, 'It will only take one vote and it may not take that.' I said, 'Well, I don't care anything about that either if it was a million dollars, it wouldn't make any difference.' And then we proceeded to talk about something else."

Tippens added that Medlin had spoken of the money being delivered in one hundred dollar bills. He further testified that following the above conversation he telephoned his own attorney and related what had happened. The next morning he talked to Judge Miller, seeking to disqualify himself because of what had occurred. Ultimately, under questioning by the judge, he revealed the name of appellant Medlin. Tippens was excused from sitting on the Hoffa jury.

On the afternoon following his discussion with the judge, Tippens sought out Medlin and informed him that he had disclosed the previous evening's conversation. Medlin expressed his regret that Tippens had done so, making the observation "it is a serious offense and it will have to be a good story." It was further testified that Medlin thereupon said that a man had called him the previous evening and asked him for Tippens' answer, and that having been told that Tippens would not agree, the man replied, "Well, there is no harm in trying."

Medlin took the stand and denied Tippens' version of their talks. It was for the jury to resolve the issue of fact made by the conflicts between the two stories. Medlin was interviewed by the Federal Bureau of Investigation and made certain denials which he later admitted were false. His account of what actually happened was as follows. He stated that some days before his conversation with Tippens he had been in a cafe in a community called Brentwood, a suburb of Nashville; that while sitting in a booth he heard three men in an adjoining booth mention the name of Jimmy Tippens and say, in effect, that they were "going to offer Jimmy Tippens $10,000 in one hundred dollar bills." Medlin claimed that he merely told Tippens what he had heard. Initially Medlin had denied to the FBI that he had spoken to Tippens either on October 23 or on the next day, October 24. He did state that he had construed the conversation in the cafe booth in Brentwood as indicating that Tippens was to be paid $10,000 if he would vote for the acquittal of Hoffa. At the trial Medlin stated that until he had heard this conversation between the men in Brentwood he had not known who Hoffa was nor even heard the name of Hoffa.

Tippens' testimony does not in exact words say that Medlin offered $10,000 to have Tippens vote for the acquittal of Hoffa. A jury, however, would be justified in so construing the quoted language and inferred the intended objective of Medlin's communication to Tippens.

It is familiar law that on the question under consideration the testimony is viewed in the light most favorable to the government, including the inferences that could be legitimately drawn therefrom. **Glasser v. United States**, 315 U. S. 60, 80 (1942); **United States v. Barnes**, 313 F. (2) 325, 326 (C. A. 6, 1963); **United States v. Decker**, 304 F. (2) 702, 705 (C. A. 6, 1962). Applying such rule, we hold that there was sufficient evidence to go to the jury.

5) Denial of motion for new trial.

a) Alleged improper argument by government counsel.

No objection was made to the criticized argument. Unless we are of the view that it was so inflammatory and prejudicial as to be beyond correction by action of the trial judge, we should follow the law that failure to object to the accused argument forecloses its use as a ground for new trial. **United States v. Socony-Vacuum Oil Co.**, 310 U. S. 150, 238-239 (1940); **United States v. Rayborn**, 310 F. (2) 339, 340 (C. A. 6, 1962), **cert. denied**, 373 U. S. 952; **Robinson v. United States**, 144 F. (2) 392, 406 (C. A. 6, 1944), aff'd 324 U. S. 282 (1945).

The case at bar was vigorously tried with the prosecution and the defense represented by aggressive and able advocates. In the final arguments to the jury each employed impassioned address not unwonted in American courtrooms.

Defendant had offered several character witnesses. In closing argument the government attorney stated:

> "It is a bad thing for a man of good character to get in trouble. Benedict Arnold, when he betrayed his country had as fine a character as any man in the nation. Judas Iscariot, the disciple, when he betrayed his Lord had as fine a character as anyone perhaps in the land.

"But unfortunate as it is, men who can show good character which stands as a witness for him, frequently commit offenses against the law and it is your responsibility to determine whether or not this defendant did commit such an offense."

We do not construe the foregoing as calling appellant Medlin a Benedict Arnold or a Judas Iscariot. We will not take notice of it as plain error. Rule 52 (b), Fed. R. Crim. P.

In closing, appellant's attorney argued in substance that his client was the innocent victim of a war on the "new frontier" between Robert F. Kennedy and James R. Hoffa. Government counsel responded that, on the contrary, the prosecution of Medlin arose from a war on jury tampering. The antagonists supported their respective positions with colorful oratory. In the context of the lawsuit before us, we cannot say that the District Judge abused his discretion in refusing to find that the foregoing exchange called for the granting of a new trial. It was a matter within his discretion. **Carter v. United States**, 231 F. (2) 232, 236 (C. A. 5, 1956); **Henderson v. United States**, 204 F. (2) 126, 127 (C. A. 6, 1953); **Weiss v. United States**, 122 F. (2) 675, 690; **Cf. Obery v. United States**, 217 F. (2) 860, 862 (C. A. D. C. 1954); **Aeby v. United States**, 206 F. (2) 296, 300 (C. A. 5, 1953).

Appellant further charges that government counsel expressed a personal conviction that defendant was guilty. Such charge arises from the following:

"I'm a lawyer, Special Prosecutor for the Department of Justice to present the facts to you and I've got a responsibility just like you, I would be violating my responsibility, violating my oath as a lawyer if I stood here this morning and exhorted you to convict a man that I believe was innocent. I wouldn't do that any more than I know that you

> wouldn't vote to convict a man that you thought was innocent. But I have the courage and I believe you have on these facts regardless of what sympathy you might have, it is a bad thing, but when the laws of the United States have been flaunted and violated and trampled under foot, we accepted you as jurors because we thought you had the kind of integrity, the kind of honor, the kind of character that would meet that test."

While not entirely clear, we assume that such remarks of government counsel could be construed as an expression of his belief that defendant was guilty.

Expression of a prosecutor's personal belief of the guilt of a defendant has been condemned by state court decisions, and the First Circuit did so in **Greenburg v. United States**, 280 F. (2) 472, 474-475 (CA 1, 1960). Such, however, has not been the rule in the United States Courts generally, nor in this Circuit where such expression by a prosecutor does not hint that such belief is supported by something other than the evidence which came before the jury in open court. **Henderson v. United States**, 218 F. (2) 14, 19 (CA 6, 1955), **cert. denied**, 349 U. S. 920 (1955); **Tuckerman v. United States**, 291 Fed. 958, 969 (CA 6, 1923), **cert. denied**, 263 U. S. 716 (1923); **United States v. Sawyer**, 347 F. (2) 372 (CA 4, 1965); **Orebo v. United States**, 293 F. (2) 747, 749 (CA 9, 1961), **cert. denied** 368 U. S. 958 (1961); **Thompson v. United States**, 272 F. (2) 919, 921 (CA 5, 1959), **cert. denied**, 362 U. S. 940 (1960); **Schmidt v. United States**, 237 F. (2) 542, 543 (CA 8, 1956); **United States v. Battiato**, 204 F. (2d) 717, 718-719 (CA 7, 1953), **cert. denied**, 346 U. S. 871 (1953). Government counsel emphasized that his argument was based "on these facts" towit, the facts in proof. We are not prepared to hold that in this case the accused language called for the granting of a new trial nor that the District Judge abused his discretion in refusing to

do so. Our review of the federal decisions relevant to the question under consideration leaves us with the impression that they announce no precise rule either of permission or prohibition easily applied without reference to the context of the particular case. See Anno. 50 A. L. R. (2) 766.

b) Charge on reasonable doubt.

After the jury had been deliberating for about two and three-quarters hours they sent the following note to the District Judge: "Would you please review instructions with regard to reasonable doubt to the jury." In response the Court instructed the jury as follows:

> "Ladies and Gentlemen, the jury has returned in the case. The court understands that the jury desires some additional instructions with regard to the court's former instructions upon reasonable doubt.
>
> "And I would instruct you further, Ladies and Gentlemen, that a reasonable doubt is a fair doubt based upon reason and common sense and arising out of the state of the evidence. It is not a fanciful or an imaginary doubt or a doubt unrelated to the state of the evidence.
>
> "A reasonable doubt would exist in the case when, after fair and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt as charged. To be satisfied beyond a reasonable doubt of the defendant's guilt does not mean that the government has to make out the case to an absolute certainty. It has to prove it only so as to leave no reasonable doubt of the defendant's guilt in the minds of the jury. It is not required that the government should exclude all doubt, but only to exclude reasonable doubt. If there should be evidence in the case that has created a reasonable doubt in your minds as to

the guilt of the defendant, then the case is not made out beyond a reasonable doubt. But if there is no reasonable ground for doubting the defendant's guilt, then the case was made out beyond a reasonable doubt.

"Now, are there any other matters, further instructions desired at this time? * * *."

Defense counsel, then present, made no objection to the foregoing nor any suggestion that it should be supplemented. The claimed error is that what was said placed the burden of proving reasonable doubt upon defendant and failed to say that a reasonable doubt could arise from a lack of evidence. This is based on the sentence "that a reasonable doubt is a fair doubt based upon reason and common sense and **arising out of the state of** the evidence," and upon the further language "if there should be evidence in the case that has created a reasonable doubt in your minds as to the guilt of the defendant, then the case is not made out beyond a reasonable doubt."

Here again, unless we felt that there was plain error and clear prejudice, it would be sufficient to remark that no objection was made to the foregoing nor a request that it be supplemented. Rule 30 Fed. R. Crim. P.; **Ashe v. United States,** 288 F. (2) 725, 730 (CA 6, 1961); **Stanley v. United States,** 245 F. (2) 427, 436 (CA 6, 1957); **Jackson v. United States,** 179 F. (2) 842, 843 (CA 6, 1950), **cert. denied,** 339 U. S. 981 (1950).

The quoted instruction did not specifically tell the jury that a reasonable doubt could arise from lack of evidence. The court did state, however, that a fair doubt is one that is based upon reason and "arising out of the state of the evidence." Defendant cites the following cases, **Blocker v. United States,** 288 F. (2) 852 (CA D. C. 1961); **United States v. Cumberland,** 200 F. (2) 609 (CA 3, 1952); and **Boatright v. United States,** 105 F. (2) 737 (CA 8, 1930),

to support his claim of prejudicial error. They hold that if an instruction on a critical point such as reasonable doubt misstates the law, it may be prejudicial error even though a correct rule is announced elsewhere in the instructions. The accused supplemental charge on reasonable doubt did not misstate the law, although it did not contain an entire review of the subject. The District Judge had, at length and correctly, already given instructions on presumption of innocence, burden of proof and reasonable doubt, and at one point therein had said that "reasonable doubt may arise not only from the evidence produced, **but from a lack of evidence.**" Language not unlike that under criticism here has been heretofore approved by this court. **Ashe v. United States,** 288 F. (2) 725, 730 (CA 6, 1961). See also **Agnew v. United States,** 165 U. S. 36, 51 (1897); **United States v. Renaldi,** 301 F. (2) 576, 578 (CA 2, 1962); **Singer v. United States,** 278 Fed. 415, 418 (CA 3, 1922), **cert. denied,** 258 U. S. 620 (1922). We do not find reversible error in what occurred in this regard.

c) Effective assistance of counsel.

Appellant contends that his counsel, Mr. Parker, by reason of the pretrial efforts that he was forced to compress into a short period of time, or possibly from causes then unknown to him, was so physically exhausted during the course of the trial as to be unable to give the defendant a proper defense. This presents a subject upon which we have no precedential guides. We at once recognize that persons charged with crime have the constitutionally guaranteed right to effective assistance of counsel upon trial.

As discussed hereinabove, defense counsel in his motion for continuance had asserted in addition to other grounds that he did not have time to prepare for trial, setting forth the long hours he had had to work in an attempt

to get ready. During the course of the trial, Mr. Parker on several occasions announced to the court that he was physically tired and was not alert. At one time he stated that he felt as though he might "fall on his face." It should be immediately noted, however, that at no time did Mr. Parker ask the court to suspend the trial for one or more days to allow him the rest and refreshment a recess would have afforded him. After making several conclusional assertions that his physical condition was preventing him from exercising the alertness essential to effective representation, Mr. Parker on the fifth and final day of trial asked the court to declare a mistrial. He stated, "I think we are entitled to a mistrial to cure the situation. I don't think that a postponement at this time is feasible."

In his address to this court, Mr. Parker emphasizes that notwithstanding the District Judge's original announcement that the court days would run from 9:00 in the morning until 4:30 in the afternoon with a one and one-half hour recess for lunch, the trial extended beyond the closing time on all five days of the trial. It is not denied, however, that the overtime court sessions were on two occasions at the request of defense counsel. As to other days, defense counsel made no objection to running past the normal closing time. Dealing with this subject, the writer of this opinion expresses his own discomfort at the possibility that any trial judge would seek to exhibit his own vigor and efficiency by constantly extending the hours of court. Every trial judge should be aware that the discharge of his own responsibility is not at all attended with the same anxiety or nervous exhaustion that is the portion of the conscientious trial advocate on the other side of the bench. The record before us, however, does not justify a view that the District Judge in this case used his position to impose undue burdens upon defense counsel. Defense counsel did not request that the

hours of trial be shortened or that a recess be taken. Once the continuance itself was denied, counsel made no request for any lesser concession; and indeed did not again directly raise the question until the last day of the trial, when he asked not for a recess or adjournment but for a mistrial.

In the motion for new trial, however, appellant's counsel buttressed his claim that he was physically exhausted during the trial by evidence that he suffered a collapse immediately following the trial. By testimony and affidavit it was shown that at the conclusion of the trial and after the verdict of the jury had been announced, Mr. Parker returned to his office and lay down on a davenport to rest. He immediately fell into a deep sleep and so remained until the next day when he was found there by his secretary. The secretary summoned a doctor who, after examining Mr. Parker, ordered him taken to a hospital. The doctor, a friend and client of Mr. Parker, testified that he had been unable to arouse Mr. Parker when he first examined him and that for some three days Mr. Parker remained in a heavy, though gradually diminishing sleep. Hospital records, compiled in part by Mr. Parker's doctor, were introduced. These disclosed a final diagnosis of Mr. Parker's difficulties as circulatory collapse; physical exhaustion, profound; and cholecystitus, subacute. The doctor expressed his opinion that Mr. Parker must have been in a state of physical exhaustion for at least three weeks prior to his collapse. The doctor stated that he would not care to have had Mr. Parker represent him in a serious law suit in the condition which the doctor thought must have been Mr. Parker's during the period of time he was trying the Medlin case. Mr. Parker was discharged from the hospital after four or five days and apparently was then fully restored to health and vigor. The District Judge made the following finding:

"[T]he Court made observations, of course, throughout the trial and has made careful observations today and I am unable to discern any difference whatsoever in the advocacy and the ability and the earnestness, awareness, and conduct of the defendant's counsel throughout the trial and his presentation today. Upon both occasions he had conducted Mr. Medlin's defense with quite thoroughness, with great skill and with great ability.

"Now, of course, after every trial it is always possible to look back upon that trial and see where you might as counsel have done things differently. But, of course, that does not constitute a basis for a new trial nor does it constitute grounds for stating that a defendant was without adequate counsel.

"The doctor indicated in his testimony that his observations of defendant's counsel's conduct in court today indicated that he was in possession of all of his faculties and awareness and was indicating his normal performance as an attorney and yet his performance throughout the trial as best the Court could see and determine from all of the five days that the case was tried is—he appeared to the Court throughout the trial at any rate to have the same skill and ability that he has obviously demonstrated here today. He has done in the Court's opinion a very able job, and a very thorough job in the trial of this case * * *."

We may assume from the record of this case that Mr. Parker, to his credit and to the credit of his profession, employed all of his abilities in representing his client without reference to the drain upon his own nervous reserves and physical resources. We like to think that such is but typical of conscientious trial counsel. It is entirely possible that the burdens of preparing for trial and the trial, ending in an adverse verdict of guilty, were sufficient to bring on Mr. Parker's collapse without such col-

lapse being proof that he had not effectively represented his client. We need not speculate in this regard. We think the District Judge who saw and observed Mr. Parker each day during the trial was in position to form a judgment from such direct observation which may be weighed against an opinion formed after the event by one who did not have such opportunity for observation.

Mr. Parker makes no claim that had he been in a lesser state of fatigue he would have tried his case any differently than he did. He does speculate that he might have objected to the claimed inflammatory argument of government counsel, or that he might have requested a more adequate instruction on reasonable doubt, as discussed above. The record, however, shows that he did object to some portions of government counsel's argument and to parts of the court's charge when the opportunity was given him. Appellee calls attention to a remark of Mr. Parker made at the end of the voir dire examination when, after expressing his surprise that so few of the jurors examined seemed to be familiar with the case about to commence, he observed "in the light of what I have heard here now that I'm feeling better and have had a little rest, **I'm raring to go with this jury.**" (Emphasis supplied.)

The trial contest of the case at bar was between the testimony of the accusing witness Tippens and that of defendant Medlin. The case was not complicated from the standpoint of investigation or presentation. We are pointed to nothing that a well-rested Mr. Parker might have done by way of more effectively cross-examining Mr. Tippens or presenting Mr. Medlin's testimony as a more credible account in the eyes of the jury. The District Judge stated that in the trial of the case "he [Mr. Parker] had conducted Mr. Medlin's defense with quite thoroughness, with great skill and with great ability." Our own

review of the record before us leaves us with the same impression, and we do not find cause to doubt the validity of the District Judge's quoted observation.

6) Composition of Grand Jury.

Appellant Medlin was indicted by the same grand jury that indicted James R. Hoffa and others. The legality of the composition of such jury was the subject of attack in the case recently decided by this court. **United States v. Hoffa et al.**, 349 F. (2) 20 (CA 6, 1965). By stipulation, the disposition of this question as to defendant Medlin was to be controlled by the disposition of the **Hoffa** case. In such decision this court held that the grand jury which returned the indictment involved had not been illegally composed.

Judgment affirmed.

APPENDIX B.

United States Court of Appeals
For the Sixth Circuit.

No. 16,034.

United States of America,
Plaintiff-Appellee,

vs.

Lawrence W. Medlin,
Defendant-Appellant.

Before: O'Sullivan and Phillips, Circuit Judges, and Cecil, Senior Circuit Judge.

Judgment.

(Filed Dec. 29, 1965, Carl W. Reuss, Clerk.)

Appeal from the United States District Court for the Middle District of Tennessee.

This Cause came on to be heard on the record from the United States District Court for the Middle District of Tennessee and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23 (4).

Entered by order of the Court.

Carl W. Reuss,
Clerk.

APPENDIX C.

No. 16,034.

United States Court of Appeals
For the Sixth Circuit.

United States of America,
Plaintiff-Appellee,

v.

Lawrence W. Medlin,
Defendant-Appellant.

Order.

(Filed Feb. 17, 1966, Carl W. Reuss, Clerk.)

Before O'Sullivan, Cecil and Phillips, Circuit Judges.

This Cause is before the Court upon a petition for rehearing of defendant-appellant, Lawrence W. Medlin, and upon due consideration thereof,

It Is Ordered that said petition be, and it is, hereby denied.

Entered by order of the Court.

Carl W. Reuss,
Clerk.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	9
Conclusion	14

CITATIONS

Cases:

Agnew v. *United States*, 165 U.S. 36	13
Ashe v. *United States*, 288 F. 2d 725	13
Beck v. *Washington*, 369 U.S. 541	10
Delaney v. *United States*, 199 F. 2d 107	10
Greenberg v. *United States*, 280 F. 2d 472	12
Ladrey v. *United States*, 155 F. 2d 417, certiorari denied, 329 U.S. 723	11
Lawn v. *United States*, 355 U.S. 339	12
Singer v. *United States*, 278 Fed. 415, certiorari denied, 258 U.S. 620	13
United States v. *Battiato*, 204 F. 2d 717, certiorari denied, 346 U.S. 871	12
United States v. *Bell*, 351 F. 2d 868, certiorari denied, March 21, 1966, No. 961, this Term	10
United States v. *Kiamie*, 258 F. 2d 924, certiorari denied, 358 U.S. 909	12
United States v. *Rinaldi*, 301 F. 2d 576	13
United States v. *Socony-Vacuum Oil Co.*, 310 U.S. 150	11

Statute and rule:

18 U.S.C. 1503 2
Rule 30, F.R. Crim. P. 13

In the Supreme Court of the United States

OCTOBER TERM, 1965

2
13

No. 1228

LAWRENCE W. MEDLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 353 F. 2d 789.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1965. A petition for rehearing was denied on February 17, 1966. By order of Mr. Justice Stewart, the time for filing a petition for a writ of

certiorari was extended to and including April 18, 1966, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motions for a continuance.

2. Whether the government attorney's rebuttal argument, directed as a reply to the closing argument of petitioner's counsel, constituted plain error.

3. Whether the district court's supplemental instructions on reasonable doubt constituted plain error.

4. Whether the district court abused its discretion in denying petitioner's motions for a mistrial and for a new trial, both of which were based on the contention that he had been inadequately represented by counsel.

STATEMENT

Petitioner was convicted after a trial by jury, in the United States District Court for the Middle District of Tennessee, on an indictment charging that he offered a federal petit juror $10,000 to vote for the acquittal of James R. Hoffa in a 1962 trial, in violation of 18 U.S.C. 1503. Petitioner was sentenced to eighteen months' imprisonment. The court of appeals unanimously affirmed. The sufficiency of the evidence, which is not in issue in this Court, is reviewed in the opinion below (Pet. App. 7A-10A).

1. Petitioner was originally one of a number of defendants named in a five-count indictment charging endeavors to obstruct justice in the 1962 trial of James R. Hoffa in the Middle District of Tennessee. In July 1963, two months after the return of the indictment (D.A. 4a),[1] the co-defendants, later joined by petitioner, filed a motion for a change of venue from Nashville on the basis of local newspaper publicity (G.A. 1b). The motion was denied (G.A. 1b-2b). Thereafter, it was publicly disclosed that Z. T. Osborn, Jr., an attorney representing petitioner's co-defendant Hoffa, had been involved in an attempted bribe of a juror in the prospective trial. In December 1963, the co-defendants, relying primarily on the Osborn incident, renewed their motions for a change of venue and for a continuance (G.A. 2b). At argument on the latter motions, petitioner sought to withdraw his participation in the motion for a change of venue and asked instead for a continuance on the basis of his counsel's workload and the Nashville publicity. On December 28, 1964, the court declined petitioner's request and granted a transfer of the case against all defendants to the Eastern District of Tennessee for trial in Chattanooga on January 20, 1964 (D.A. 9a-11a). In a supporting opinion, the court noted the front-page publicity then appearing daily in the two Nashville newspapers, and observed that, while it might ordinarily reserve its ruling until

[1] "D.A." refers to petitioner's printed appendix in the court of appeals. "G.A." refers to the government's printed appendix in that court.

after the *voir dire* examination of the jury panel, it had decided to grant the motion in order to avoid a "possible substantial delay" in the trial and to remove "any cloud of possible error" (D.A. 5a-9a). On January 17, 1964, the court of appeals, on application of petitioner, directed that the order transferring the case be vacated as to petitioner only. The complying order of the district court on January 20, 1964 (G.A. 2b; D.A. 12a), had the effect of granting petitioner a severance and a continuance.

On March 16, 1964, after the conviction of the other defendants in Chattanooga, petitioner's trial was set for March 30, 1964 (D.A. 13a). On March 25, petitioner filed a motion for a continuance on the ground that allegedly prejudicial press, radio, and television publicity in the Nashville area since 1962 had rendered a fair trial impossible, and on the further ground that his counsel had a heavy trial schedule for the period during which the trial had been set (D.A. 14a-20a). In an order denying the motion, the court noted (D.A. 22a-23a):

> With regard to the first ground of the motion, the Court has carefully read and considered the motion and all exhibits filed therewith, including all newspaper accounts and other publicity made a part of the exhibits. Much of this publicity has no reference whatsoever to the defendant, Medlin. Only a very small part of it makes any specific reference to him or to matters that might properly be considered relevant to his case. Moreover, whether such publicity has in any manner prejudiced said defendant in obtain-

> ing a trial by a fair and impartial jury can better be determined upon the *voir dire* examination of the jury.

A further motion for a continuance was filed, argued and denied on March 30, 1964, the first day of trial.

Voir dire of prospective jurors began March 30, 1964, over ten months after the return of the indictment and three months after the transfer from Nashville of the case against the six original co-defendants. Members of the panel had been subpoenaed only a week before (G.A. 3b, 17b, 32b). They were instructed and examined in groups by the court, and were then examined individually, out of the presence of the others, by counsel for the government and counsel for the defense. As each group of prospective jurors was called for examination, the court informed them of the nature of the charge and asked them, *inter alia*, if they had ever talked to anyone who had purported to know the facts of the case; if they had heard or read anything that would cause them to form any opinion as to petitioner's guilt or innocence of the matter charged; if they had ever formed any opinion as to petitioner's guilt or innocence; if they had any prejudice against or sympathy for the government or petitioner; and if they knew of any reason why they could not try the case solely on the evidence presented in court (G.A. 6b-7b, 21b-22b, 28b, 33b-34b, 37b, 40b-41b). Of the 35 potential jurors so examined by the court, none answered any of these questions affirmatively. After further *voir dire* by both counsel, petitioner's attorney indicated to the

court that in light of his motion for a continuance he was surprised by the small number of panel members who had read much about the case (G.A. 26b-27b), and by the lack of necessity to challenge jurors for cause (G.A. 39b). At the end of two days of *voir dire* examination, no panel member had been challenged for cause on the ground that he was biased or had been influenced by publicity. Of the twelve jurors and two alternates finally impaneled, only two said that they had read anything concerning petitioner at all (G.A. 17b, 29b-30b), and a third was shown only to have heard petitioner's name mentioned on television (G.A. 14b). No juror expressed any doubt of his ability to try the case solely on the evidence presented at trial.

2. In the course of closing argument, petitioner's counsel referred to "the Hoffa hysteria hit[ting] the Federal Government," and the resulting "terrible war between two fanatical giants * * *, each intent on the destruction of the other." He then characterized petitioner as an innocent victim of that war (G.A. 78b). He emphasized the testimony concerning petitioner's previous good reputation, and argued that if petitioner were "the type of person capable of committing the offense charged" the various character witnesses would not have testified as they did (G.A. 85b). He stated (G.A. 78b):

> I sincerely believe with all my heart he is entitled under the evidence presented to this court and jury to be acquitted and to have this terrible burden removed and the stigma of this recklessly-brought indictment erased from his name.

He further stated that the government attorney "is wrong, dead wrong if he thinks this evidence justifies a conviction of Medlin" (G.A. 83b).

In rebuttal, government counsel prefaced his remarks by admonishing the jury that "if you are not convinced beyond a reasonable doubt that this man is guilty, turn him loose," and added, "if you are convinced" that the crime was committed, "it is your sworn duty" to return a finding of guilty (G.A. 86b). He then argued that "this is not a war as [the defense attorney] with considerable eloquence said between Kennedy and Hoffa", but "a war against tampering with justice" in which the jurors were "called on now to say which side [they] stand on" (G.A. 87b). He argued (G.A. 87b):

> [I]f jury fixing is to be tolerated in this country you might as well tear down this beautiful flag now with its 50 stars and stomp it into the ground and then go home and burn your houses up.

With regard to the evidence of petitioner's previous good character, government counsel argued that "it is a bad thing for a man of good character to get in trouble" but "unfortunate as it is, men who can show good character frequently commit offenses", citing Benedict Arnold and Judas Iscariot as illustrative. He then noted that he would be violating his responsibility if he exhorted the jury to convict a man he believed to be innocent, and stated (D.A. 80a-81a):

> I wouldn't do that any more than I know that you wouldn't vote to convict a man that you

> thought was innocent. But I have the courage and I believe you have on these facts regardless of what sympathy you might have * * *.

Although objection was made to another part of government counsel's argument (D.A. 80a), none was made to the above portions.

In its instructions to the jury the trial court charged (G.A. 89b):

> Do not allow anything in the argument of the attorneys during the course of this trial to cause you to have any prejudice or any sympathy or to cause you to do anything other than to try this case on the evidence produced and upon the instructions of the Court.

3. After a period of deliberations, the jury asked for a review of the court's instructions on reasonable doubt. In response the court instructed (D.A. 83a), as it had done earlier (G.A. 88b):

> [A] reasonable doubt is a fair doubt based upon reason and common sense and arising out of the state of the evidence. * * *
>
> A reasonable doubt would exist in the case when, after fair and impartial consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt as charged. * * * [The government has to prove its case] only so as to leave no reasonable doubt of the defendant's guilt in the minds of the jury. It is not required that the government should exclude all doubt, but only to exclude reasonable doubt. If there should be evidence in the case that has created a reasonable doubt in your minds as to the guilt of the defendant, then the

> case is not made out beyond a reasonable doubt. But if there is no reasonable ground for doubting the defendant's guilt, then the case was made out beyond a reasonable doubt.

No objection was made to the language of the charge, either at the time it was originally given or when it was repeated in response to the jury's request.

4. In a motion for a mistrial made after the close of the defense case (D.A. 76a) and again in a motion for new trial, petitioner alleged, through his retained counsel, that counsel had been too tired during the trial to meet the minimum standards of adequate representation. The first motion was summarily denied. At a hearing on the latter motion, counsel produced evidence to the effect that on the day following the return of the verdict, counsel was hospitalized and slept for most of three days due to exhaustion (D.A. 85a-98a). The trial judge denied the motion, noting that he was "unable to discern any difference whatsoever in the advocacy and the ability and the earnestness, awareness, and conduct of the defendant's counsel throughout the trial and his presentation" at the hearing (G.A. 91b). On each occasion, the judge found, counsel conducted the defense with "thoroughness, with great skill and with great ability" (*ibid.*).

ARGUMENT

1. There was no abuse of discretion in the district court's denial of petitioner's motions for a continuance based on the existence of pretrial publicity. Although the Nashville publicity was found sufficient in

December 1963 to justify a transfer of the case against all defendants to Chattanooga, the trial judge specifically noted that his decision was made without the benefit of a *voir dire* examination of the prospective jurors in order to prevent a possible substantial delay, and that the matter was resolved in the defendants' favor so as to remove any possibility of error (D.A. 8a-9a). At the time of petitioner's motions the following March, the trial court noted that, in contrast to the daily publicity earlier given to the entire case and to Hoffa, its central figure, there had since appeared only a small amount of publicity concerning the case of petitioner (D.A. 22a). In any event, the real measure of the effect of that publicity, the *voir dire* examination, disclosed not a single instance where the news coverage caused a potential juror to form any opinion concerning the guilt or innocence of petitioner. Under the circumstances, petitioner failed to demonstrate that the denial of his motion resulted in any essential unfairness.[2] See *Beck* v. *Washington*, 369 U.S. 541, 558; *United States* v. *Bell*, 351 F. 2d 868, 875-877 (C.A. 6), certiorari denied, March 21, 1966, No. 961, this Term.

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[2] Petitioner's reliance on *Delaney* v. *United States*, 199 F. 2d 107 (C.A. 1), as a case conflicting with the decision of the court below (Pet. 7, 11), is misplaced. *Delaney* concerned intense publicity which resulted from the fact that a committee of the House of Representatives continued to investigate the case after the indictment had been returned. The court observed that the publicity would have constituted prejudicial error if generated by the prosecution, and concluded that there was no difference whether the United States had acted through its legislative or its executive branch.

Similarly, there was no abuse of discretion in denying the motions on their alternate ground—that defense counsel had inadequate time to prepare for trial due to a heavy case schedule in March and April 1964. Counsel had been retained more than a year before January 20, 1964, the date of the scheduled trial in Chattanooga (G.A. 61b-62b, 71b). The severance of petitioner's case on that date in effect afforded him an additional continuance of more than two months. Denial of a further delay was entirely appropriate.

2. Petitioner's various challenges to government counsel's rebuttal argument were not made during the trial and cannot be first asserted on appeal from his conviction. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239. In any event, they are without merit. The references to the toleration of jury tampering were contained in passages urging, in substance, that if the evidence proved petitioner guilty, the jurors should set aside any possible sympathies or prejudices they might have and enter a finding of guilt. The references to Benedict Arnold and Judas Iscariot were not, as petitioner contends, attempts to characterize him as similar. They simply illustrated the proposition "that one who has theretofore borne a good reputation may commit a crime"—"that proof of a good reputation is not a complete defense"—an argument well within the bounds of propriety. *Ladrey* v. *United States*, 155 F. 2d 417, 419 (C.A. D.C.), certiorari denied, 329 U.S. 723. And government counsel's oblique suggestion that he believed petitioner guilty, expressly predicated "on

these facts" (D.A. 81a), was a reply to the direct expression of a contrary personal belief by petitioner's counsel (G.A. 78b). It was a permissible response. See *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15; *United States* v. *Kiamie*, 258 F. 2d 924, 934 (C.A. 2), certiorari denied, 358 U.S. 909; *United States* v. *Battiato*, 204 F. 2d 717, 718-719 (C.A. 7), certiorari denied, 346 U.S. 871.[3] Moreover, any possibility of prejudice was minimized by the trial court's adomonition to the jury regarding the weight to be given to the arguments of counsel (G.A. 89b).

3. There is no merit to petitioner's assertion that the trial court's supplemental instruction failed to apprise the jury that a reasonable doubt might arise from a lack of evidence (Pet. 20-24). Although the court once referred to "evidence * * * that has created a reasonable doubt", it also mentioned that such doubt might arise out of the "state of the evidence" (D.A. 83a). Additionally, the jurors were specifically reminded that the government must prove its case "so as to leave no reasonable doubt," and that a reasonable doubt would exist if "after * * * consideration of all the evidence, the jurors do not feel convinced to a moral certainty of the defendant's guilt" (*ibid.*). The instruction implied no burden on the defendant

---

[3] In *Greenberg* v. *United States*, 280 F. 2d 472 (C.A. 1), a case petitioner cites as conflicting with the decision below (Pet. 15), the prosecuting attorney directly expressed his belief in the defendant's guilt, the defense counsel objected, the trial judge ruled, in the presence of the jury, that the prosecutor had a right to argue "his belief in the evidence", and the argument was then repeated. 280 F. 2d at 474.

to offer evidence raising a doubt. See *Agnew* v. *United States*, 165 U.S. 36, 51; *United States* v. *Rinaldi*, 301 F. 2d 576, 578 (C.A. 2); *Ashe* v. *United States*, 288 F. 2d 725, 730 (C.A. 6); *Singer* v. *United States*, 278 Fed. 415, 418 (C.A. 3), certiorari denied, 258 U.S. 620. In any event, since petitioner made no objection to the charge on either of the occasions when it was given (G.A. 88b; D.A. 83a), he is not now in a position to complain. Rule 30, F.R. Crim. P.[4]

4. The district court properly rejected petitioner's motions for a mistrial and for a new trial based on the contention that he had been inadequately represented by counsel. Although testimony at the hearing disclosed that defense counsel was exhausted after trial and required hospitalization, his performance during trial was the only relevant consideration. That performance was found by the trial court to have been characterized by "thoroughness, * * * great skill and * * * great ability" (G.A. 91b). As noted by the court of appeals, the trial judge found explicitly that counsel manifested the same skill and ability during the trial as he showed in the post-trial hearing on his motion for a new trial—which took place after he was fully rested (Pet. App. A, 17A-18A). And petitioner's counsel made no suggestion below that he would have tried the case any differently had he not been fatigued, but only speculated that he might have objected to the government's rebuttal

[4] Moreover, the court expressly stated in an earlier portion of the charge that "reasonable doubt may arise not only from the evidence produced, but from a lack of evidence" (G.A. 88b).

argument and to the court's supplemental instruction (Pet. App. A, 19A). Under the circumstances, there was plainly no lack of effective representation.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
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MAY 1966.

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In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1965.

No. 1228

LAWRENCE W. MEDLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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In The

SUPREME COURT OF THE UNITED STATES,

October Term, 1965.

No. 1228 . .

LAWRENCE W. MEDLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

Your Petitioner, Lawrence W. Medlin, respectfully prays for a rehearing of the order of this Court dated June 6, 1966, denying his petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

BASIC FACTS

This is a criminal action wherein Petitioner was convicted of violation of 18 U. S. C., Section 1503, and sentenced to 18 months imprisonment. The indictment upon which Petitioner was tried comprised one count of a five-count indictment filed in the U. S. District Court for the Middle District of Tennessee on May 9, 1963, wherein the Petitioner, James R. Hoffa, and five other defendants were charged with offenses involving alleged attempts to obstruct and impede the due administration of justice in the District Court of the United States. The trial as to all defendants was transferred to the Eastern District of Tennessee. Upon application to the Court of Appeals for the Sixth Circuit, Petitioner procured the return of the trial as to him to the Middle District of Tennessee at Nashville, with the result that he was tried alone on the second count of the indictment. The trial of Hoffa and the other co-defendants in Chattanooga resulted in convictions which were subsequently affirmed by the Court of Appeals and which are now pending for review in this honorable Court, Certiorari having been granted.

ARGUMENT

Petitioner assigns the following reasons for granting this petition:

The decision of the court below is in conflict with the decisions of the Ninth Circuit Court of Appeals in Evalt vs. United States, 359 F. 2d 534; the decision of the Court of Appeals for the District of Columbia Circuit in Inge vs. United States, 356 F. 2d 345; and the decision of the Court of Appeals for the District of Columbia Circuit in Reichert vs. United States, 359 F. 2d 278. Petitioner was aware of none of these decisions when his original petition was filed.

The third question presented in Petitioner's original application to this Court dealt with the prejudicial effect of the government attorney's closing argument to the jury. The court below declined to interfere with the judgment on this ground, principally because no objection was made at the time by Petitioner's counsel, notwithstanding the disability of counsel dealt with in question number two of the original petition.

The argument complained of implied personal knowledge and belief of the prosecutor in the guilt of the Defendant.

Each of the newly discovered decisions cited above deals with a similar question, and holds that the argument of the United States Attorney constitutes real error requiring reversal even in the

absence of objection. Of particular significance is the language in the Reichert opinion, 359 F. 2d at page 282:

> "But the clear implication of the argument was that the prosecutor knew personally that the "statements" were damaging and tended to corroborate the witnesses upon whom the Government relied,.... The jury very possibly could have regarded the Government's attorney as an unsworn witness attesting that the witness had not been impeached because on the basis of their statements, not in evidence, they could not have been." (Emphasis supplied.)

The present case is now presented for rehearing on the basis of a conflict between the Sixth Circuit and the Ninth Circuit and the Circuit for the District of Columbia, not heretofore known to exist, in addition to the grounds asserted in the original petition, which Petitioner believes to be meritorious.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that the order of this Court denying his petition for a

writ of certiorari to the Court of Appeals for the Sixth Circuit be reheard and vacated, and that the petition be granted.

Dated June 30, 1966,

R. B. PARKER, JR.
JAMES H. BATEMAN

By: R. B. Parker, Jr.
Counsel for
Petitioner

CERTIFICATE OF COUNSEL

The undersigned, R. B. Parker, Jr., Attorney for Petitioner, hereby certifies that the Petition for Rehearing filed in this cause is presented in good faith, that in his judgment said petition is restricted to the grounds specified in Paragraph 2 of Rule 58 of this honorable Court, and that said petition for rehearing is not interposed for delay.

R. B. Parker, Jr.
R. B. PARKER, JR.
Attorney for Petitioner